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In the Supreme Court of the United States

OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEES

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QUESTION PRESENTED

Whether the district court properly granted summary judgment to appellees on the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. 534 and 535, in light of the record compiled pursuant to this Court's remand instructions.

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STATEMENT

The "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), 47 U.S.C. 534 and 535, require cable operators to set aside a limited number of channels for the carriage of qualified broadcast television stations. Pub. L. No. 102-385, 106 Stat. 1460. In 1993, a three-judge district court granted summary judgment upholding the provisions against First Amendment challenges. 819 F. Supp. 32. On appeal, this Court concluded that genuine issues of material fact were in dispute and remanded the case for development of a fuller factual record. 114 S. Ct. 2445 (1994). On remand, the district court again granted summary judgment and sustained the challenged provisions in light of the legislative record and additional factual evidence submitted by the parties.

1. In its prior decision, this Court rejected appellants' contention that the must-carry provisions require strict scrutiny. The Court concluded that must-carry does not "distinguish favored speech from disfavored speech on the

basis of the ideas or views expressed," and does not give a preference to "broadcasters over cable programmers based on the content of programming each group offers." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2459, 2467 (1994). Rather, the Court emphasized, the provisions are designed "to prevent cable operators from exploiting their economic power to the detriment of broadcasters," and "to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content." *Id.* at 2462.

Because the must-carry provisions are content-neutral and do not pose any "inherent danger[] to free expression," the Court held that they must be sustained if they satisfy an intermediate level of First Amendment scrutiny. 114 S. Ct. at 2469. Under that standard, the Court reaffirmed, a content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Ibid.*

Based on the record then before the Court, a four-Justice plurality could not conclude that the government had demonstrated the absence of any genuine issue of material fact as to two parts of the constitutional test of intermediate scrutiny. The plurality therefore found it necessary to remand the case to the district court for further factual development. 114 S. Ct. at 2472. Justice Stevens, although concluding that the government had sustained its burden under intermediate scrutiny, concurred in the remand to ensure a disposition of the case. *Id.* at 2475.[1]

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[1] The Court accordingly rejected the view of four Justices that the must-carry rules require strict scrutiny, see 114 S. Ct. at 2475 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2481 (Ginsburg, J., concurring in part and dissenting in part), as well as the

Concerning the requirement that a content-neutral regulation of speech further a substantial government interest, the Court ruled that must-carry's purpose of ensuring access by the public "to a multiplicity of information sources is a governmental purpose of the highest order." 114 S. Ct. at 2470. It also held that "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." *Ibid.* But the plurality could not definitively conclude that those purposes are actually implicated by the must-carry rules. In particular, the Court's remand instruction stated that the government had not yet sustained "two essential propositions": "(1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 2471, 2472.

Regarding narrow tailoring, the remand instruction stated that the record needed supplementation to determine "the extent to which the must-carry provisions in fact interfere with protected speech." 114 S. Ct. at 2472. It stated that certain questions were "critical" to the issue of narrow tailoring, including "the extent to which cable operators will, in fact, be forced to make changes in their current or anticipated programming selections; the degree to which cable programmers will be dropped from cable systems to make room for local broadcasters; and the extent to which cable operators can satisfy their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters." *Ibid.* The instruction indicated a need for "judicial findings

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rationale under which three Justices would have held that must-carry is invalid under intermediate scrutiny, see *id.* at 2479-2480 (O'Connor, J., concurring in part and dissenting in part).

concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." *Ibid.*

2. On remand, the district court again granted summary judgment to appellees. J.S. App. 1a-32a, 153a-154a.

a. (i) On the need for must-carry to advance the government's important interests, the court found substantial evidence "from which Congress could reasonably conclude that cable systems had significant and increasing incentives to deny carriage or reposition local broadcasting stations in order to: 1) increase their advertising revenues, the 'cable industry's hottest and brightest area of growth;' and 2) favor cable programming in which they had an equity interest." J.S. App. 9a (citation to record evidence omitted). The court noted that cable operators are becoming capable of selling advertising to an extent comparable to sales by local broadcast competitors, and that "the cable industry [is] increasingly looking to advertising as a source of revenue." *Ibid.* It also found evidence that "cable operators with equity interests in cable programmers would have every reason to discriminate against broadcast stations competing with their own programmers." *Id.* at 10a.

On the question of harm to broadcasters in the absence of must-carry, the court rejected appellants' argument that must-carry could be sustained only if the *entire* broadcast industry (including the network affiliates) would fail if must-carry were withdrawn. J.S. App. 8a n.11. The court instead focused on what *Turner* had identified as the government's "two essential propositions" in support of mandatory carriage rules: first, that "significant numbers of broadcast stations will be refused carriage on cable systems" absent must-carry protection, and second, "that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." *Id.* at 3a (quoting 114 S. Ct. at 2471).

The court first concluded that Congress had received substantial "evidence that cable operators had already dropped, refused to carry, or adversely repositioned significant number[s] of local broadcasters," including "various studies," and "voluminous [anecdotal] evidence of adverse carriage decisions by the cable industry directly from the harmed broadcast stations." J.S. App. 11a, 12a. The court found further evidence that adverse carriage actions reduce broadcasters' audience levels, causing advertising revenues of commercial broadcasters to decline and diminishing public broadcasters' ability to obtain viewer contributions. *Id.* at 15a. "When the revenue declines," the court concluded, "the station's ability to provide quality programming is hampered, further decreasing the viewing audience and creating a vicious cycle of declining financial stability and health." *Ibid.*

(ii) Addressing the requirement of narrow tailoring, the court first examined must-carry's "actual effects" on the cable industry, as directed by the remand (114 S. Ct. at 2472), and found those effects to be insubstantial. J.S. App. 18a-22a. It concluded (based on testimony of appellants' own expert) that cable operators had been required to devote only 1.2% of their channels to broadcast stations added because of the must-carry requirements. *Id.* at 19a. It also noted that channel capacity is expected to increase greatly, which will further diminish the already minor burden imposed on cable operators by must-carry. *Id.* at 21a-22a.

As to "the degree to which cable programmers have been dropped from or repositioned by cable systems to make room for local broadcasters" (114 S. Ct. at 2472), the court found that effect to be trivial. It again relied on appellants' own expert, who estimated that, out of about 500,000 total channels of cable capacity, cable programmers had been dropped from only 780 channels because of the must-carry rules (J.S. App. 20a). And regarding "the extent to which cable operators can satisfy

their must-carry obligations by devoting previously unused channel capacity to the carriage of local broadcasters" (114 S. Ct. at 2472), the court found that cable operators have been able to do so 87% of the time. J.S. App. 19a-21a.

Finally, the court concluded that various proposed alternatives "are not in any respect as effective" as must-carry. J.S. App. 22a-23a. It concluded, for example, that "A/B switches," which permit a television watcher to switch from cable stations to over-the-air stations, are not an effective alternative because of the cost and inconvenience in using the switches and the necessary accompanying antennas, and cable subscribers' resulting unwillingness to rely on them. *Id.* at 23a-25a. It also concluded that appellants' proposed leased-access regime would not work, since broadcast stations that are economically vulnerable would be unable to pay a carriage charge or would have to reduce expenditures on programming in order to pay the fee. *Id.* at 26a. It reached similar conclusions about direct subsidies to broadcasters, reliance on the antitrust laws or supervision by the FCC, and more restricted carriage obligations. *Id.* at 23a-27a.[2]

b. District Judge Jackson concurred. J.S. App. 33a. While noting his preference for a trial, he stated that he was satisfied that "the evidence before Congress in 1992 of an impending demise of local broadcasting was at least 'substantial' enough to warrant its prediction * * * in

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[2] The court also dismissed appellant Time Warner's Fifth Amendment just compensation claims without prejudice, concluding that, "because [those claims] pertain to specific property interests, [they] are best dealt with on a case-by-case basis" rather than in a facial challenge to the constitutionality of the statute. J.S. App. 28a. And it granted summary judgment to appellees on appellants' free-speech challenge to cable operators' separate obligation to carry certain low-power broadcast stations, stating that, although those provisions "are very close to content-based legislation triggering strict scrutiny, we do not believe that they cross the line." *Id.* at 29a.

absence of must-carry." He also accepted "as minimal the burden must-carry imposes on the cable industry's First Amendment rights of free speech." *Ibid.*

c. Circuit Judge Williams dissented. J.S. App. 38a-112a. He interpreted the *Turner* mandate to require a finding that the broadcast industry *as a whole* "would be 'seriously jeopardized' " in the absence of must-carry (*id.* at 42a-43a, 46a), and he found it clear that the broadcast industry *as a whole* does not need must-carry to survive. He nonetheless did find evidence that must-carry serves important governmental interests. He accepted that cable operators have incentives to discriminate against broadcasters, in order to favor their own vertically integrated cable programming and to impair broadcasters' ability to compete for advertising revenues. *Id.* at 73a-88a.

Judge Williams nonetheless would have granted summary judgment for appellants on the ground that must-carry is not narrowly tailored. J.S. App. 73a. He proposed two alternatives to address Congress's concerns: use of A/B switches by consumers, and a "non-discriminatory" leased-access regime, whereby cable operators would be required to set aside channels for both broadcasters and cable programmers at a price fixed by the government. *Id.* at 96a-108a.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994), this Court resolved the principal issues of First Amendment doctrine raised by the must-carry law. It held, first, that must-carry does not require strict scrutiny because it does not regulate any speech because of the message it conveys (*id.* at 2460-2464), does not grant cable access to broadcasters in order to counteract the speech of others (*id.* at 2464-2465), does not force the cable operator to associate with broadcasters' messages (*id.* at 2465-2466), and does not single out speakers or part of the press in a way that suggests a danger to free expression (*id.* at 2466-2469). It therefore ruled that must-carry must

be evaluated under an intermediate level of scrutiny, which requires that the regulation further an important governmental interest in a narrowly tailored way. *Id.* at 2469.

The Court had "no difficulty concluding" that each of the "three interrelated interests" declared by Congress to be served by must-carry—"(1) preserving the benefits of free, over-the-air, local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming"—is "important," under the test for intermediate scrutiny. 114 S. Ct. at 2469. It also necessarily rejected the rationale under which three dissenting Justices would have held that must-carry fails intermediate scrutiny (see *id.* at 2479 (O'Connor, J., concurring in part and dissenting in part)). All those matters are now settled as the law of the case.

But because "the standard for summary judgment is high," and because "there remain[ed] a few unresolved issues of material fact" (114 S. Ct. at 2472 (Blackmun, J., concurring)), the Court remanded the case "to permit the parties to develop a more thorough factual record, and to allow the District Court to resolve any factual disputes remaining." *Id.* at 2472. The remand emphasized that "courts must accord deference to the predictive judgments of Congress," and must not "replace Congress' factual predictions with [their] own"; rather, it stated, the courts' task "is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 2471. Those instructions too are the settled law of the case.

The district court on remand compiled a vast record, comprising materials available to Congress before enactment of the 1992 Cable Act, as well as facts and expert opinion adduced since its passage. Based on those submissions, the district court concluded that Congress had indeed reasonably concluded that must-carry is necessary

to further the "three interrelated interests" already accepted by this Court to be substantial. That conclusion was correct. It was reasonable for Congress—"far better equipped than the judiciary" to evaluate the need for economic regulation of the cable industry (114 S. Ct. at 2471)—to conclude that the harms addressed by must-carry are real, that must-carry would alleviate those harms, and that no alternative to must-carry would be sufficiently effective.

I. A. Must-carry serves substantial interests, even if it is not necessary to prevent the collapse of the *entire* broadcast industry. The rule guards against anti-competitive conduct by cable operators against vulnerable broadcasters, a governmental interest that is "always substantial." It prevents erosion in the financial health and programming quality of broadcasters, by affording them an opportunity to compete fairly for the entire cable audience. And in doing so, it advances the substantial, indeed, compelling governmental interest in multiplicity and diversity of communications sources available to the public.

B. Absent must-carry, cable operators would have the incentive and means to discriminate against a substantial number of broadcasters by denying them access to cable; and in fact, when must-carry was not in existence, they did so discriminate. Cable operators affiliated with cable programmers have an incentive to run their own programming instead of local independent and public broadcasters, with whom they compete directly for audience share; that is true regardless of local audience preference. Whether or not vertically integrated, cable operators also have an incentive to replace broadcasters with cable networks, because operators can sell their own local advertising on the latter but not the former. Cable operators compete directly with local independent commercial broadcasters in the advertising market.

The experience before must-carry was enacted shows that cable operators did indeed drop substantial numbers of the broadcasters with whom they compete. The typical cable system denied access to more than a quarter of local broadcasters, principally independent commercial stations and secondary public broadcasters. As a result, dropped commercial stations were unable to reach almost half of their potential cable audiences.

C. The effect of loss of carriage on broadcasters is severe. Loss of access to viewers causes a decline in advertising revenues and viewer contributions. Without assured access, new stations have difficulty in obtaining the investment capital necessary to start operations. Inversely, independent broadcasters that gain cable access benefit substantially, which proves their value to the public. The increase in broadcasting outlets in the 1980s was due largely to increased cable access, and after the demise of must-carry in 1987, that increase fell sharply—a reasonable basis for Congress's conclusion that must-carry is necessary to the financial health and programming quality of many broadcasters.

II. A. Whereas, in the *absence* of must-carry, there would be a serious impairment of the financial health and programming quality of local broadcasters at the hands of cable operators, and substantial erosion of broadcast diversity as well, the *presence* of must-carry has had a negligible effect on the editorial discretion of cable operators and on the ability of cable programmers to gain access to the cable. Although they often constitute a substantial percentage of the free broadcast options available, must-carry stations by contrast occupy only a tiny percentage of cable channel capacity. Most cable operators have been able to meet their obligations with unused capacity, and have not had to drop any cable channels. Channel capacity has increased and continues to increase; that growth further diminishes the slight burden of mandatory carriage. Cable networks continue

to gain access to cable systems and to increase their subscribership.

B. There is no effective alternative to must-carry as a means of preventing anti-competitive conduct by cable operators, the erosion of free broadcast television, and the resulting impairment of media diversity. Consumers will not use A/B switches and outdoor antennas to watch over-the-air signals on their cable-wired sets, because of expense, complexity, and inconvenience. More limited carriage rules, featuring minimum viewership standards, would fail to protect the very broadcast stations that are most vulnerable to predation by cable operators, and would allow those operators to discriminate in favor of cable programmers against broadcasters without regard to the ratings of either. A leased-access regime open to cable programmers as well as broadcasters would drain resources from broadcasters' programming and would not enable broadcasters to gain the necessary access to their potential cable audiences. Direct subsidies would keep broadcasters afloat regardless of their popularity, rather than give them the opportunity to prove their value to the entire audience, which is the objective of must-carry. Antitrust enforcement and administrative oversight are too cumbersome or expensive to protect broadcasters vulnerable to discrimination.

ARGUMENT

I. THE MUST-CARRY RULE DIRECTLY ADVANCES SUBSTANTIAL GOVERNMENTAL INTERESTS

Cable television plainly carries the potential for a great expansion in the diversity of communications outlets available to the American public, but it also has the potential seriously to impair that diversity as well. The technology of the delivery of the signal to the home, the *de facto* monopoly position of most cable operators, and the increasing vertical integration and horizontal concentration of the industry place cable systems in a position of great economic power over programmers who

need to secure a place on the cable to survive. Cable operators' incentives for discriminatory self-preference place the voices of many of those programmers at risk of being silenced or severely weakened.

Those concerns, Congress found, are acute for free local broadcast programming, the leading source of news and entertainment for the public. As most of the country has obtained cable service, cable carriage has become essential for broadcasters to reach much of their audience. But cable operators, increasingly affiliated with programmers and increasingly oriented to advertising as a revenue source, compete directly with local broadcasters and therefore have incentives to deny them carriage. Without cable carriage, broadcasters would lose much of their audience and, with it, the revenues (from advertising or viewer contributions) essential to creating programming or even staying on the air. The remaining audience, less affluent than those who can afford cable or less inclined to watch television, would also be less attractive to advertisers.

The threat is not just to individual broadcasters but also to the First Amendment interest of the viewers, "which is paramount." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). The Nation's fundamental communications policy has been to *increase* the number of speakers, to promote a *multiplicity* and *diversity* of outlets. If broadcasters unfairly lose access to much of their cable audience, not just those stations, but also the diversity of voices in the media may be impoverished. Viewers with and without cable service could lose valuable options in broadcast television. These are the dangers to which must-carry is addressed, and Congress's remedy for them advances the values protected by the First Amendment.

A. Must-Carry Prevents Erosion Of Media Diversity And Broadcasters' Quality And Financial Health, And Also Prevents Anti-Competitive Conduct

1. Appellants contend, at bottom, that must-carry cannot be sustained unless it is shown that the *entire* broadcast industry would collapse in its absence. But Congress did not predicate must-carry on any such assumption, and this Court did not suggest in *Turner* that must-carry could be upheld only in that extreme situation. Nor did we argue in *Turner* that must-carry was based on a prediction that broadcast television is likely to be totally eliminated in its absence.[3]

"Congress declared that the must-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Turner*, 114 S. Ct. at 2469. Each of the three, independently, is an important governmental interest. *Id.* at 2469-2470. Each of the three is directly advanced by must-carry even if the protection it affords is needed principally by broadcasters with the least economic power.

The statute makes clear that Congress did *not* contemplate that the entire broadcast industry would be in jeopardy absent must-carry protection. Congress expressly found that "broadcast programming that is carried [by cable operators] remains the most popular programming on cable systems." 1992 Cable Act § 2(a)(19). It recognized that the most popular broadcast stations, such as the network affiliates, would continue to obtain cable

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[3] To the contrary, we argued that "the question is whether the broadcast services available to viewers who do not subscribe to cable television are likely to be reduced to a significant extent, because of either loss of some stations altogether or curtailment of service by others." *Turner* Gov't Br. 32 n.22 (No 93-44).

carriage by mutual agreement with cable operators, who depend upon those stations to "subsidize" their cable networks. See S. Rep. No. 92, 102d Cong., lst Sess. 35 (1991) (Senate Report).

The retransmission consent provision of the 1992 Cable Act, 47 U.S.C. 325, is based on the same assumption. Under that provision, local commercial broadcasters may demand compensation from cable operators for the retransmission of their signals. That provision could benefit local broadcasters only if they were in a relatively strong position vis-a-vis cable operators and could realistically expect that cable operators would pay to retransmit their signals. Such strong broadcasters would not need must-carry protection, and indeed they may not rely on it if they invoke their retransmission consent rights. 47 U.S.C. 325(b)(1)(B), (b)(3)(B).

But while Congress anticipated that much of the broadcast industry would thrive without must-carry, it was legitimately concerned that a significant number of more vulnerable stations would be subject to discriminatory carriage actions by cable operators. Congress recognized that cable operators have increasing incentives and opportunities to discriminate against vulnerable stations, to give a preference to their own programming and to gain an advantage in securing advertising revenues. See 1992 Cable Act §§ 2(a)(5), (14) and (15). It also concluded that, absent cable carriage, those stations would not have a fair chance to compete for an audience, and, having lost the large percentage of the audience that subscribes to cable, would also lose the ability to originate quality local programming, if not fail altogether. *Id.* § 2(a)(16). That diminishment in service, in turn, would impair the compelling national interest in "a diversity of views and information." *Id.* § 2(b)(1). In other words:

> Broadcasters who lose substantial portions of their audience will be unable to continue to provide local public service programming, * * * [which will] not only lead to diminished diversity of opinion, but also to reduced competition in the local video market and the strengthening of a cable system's dominant position in providing video services, contrary to the strong governmental interest in fostering active competition. * * * The *incremental weakening* of local broadcasters that results from being dropped across a portion of their market, or by discriminatory carriage conditions, will result in *those stations'* losing their ability to compete in a competitive programming market.

H.R. Rep. No. 628, 102d Cong., 2d Sess. 64 (1992) (1992 House Report) (emphasis added).

2. This Court concluded in *Turner* that each of the "three interrelated interests" identified by Congress is substantial. 114 S. Ct. at 2469. The Court did not suggest that must-carry could be justified only by an imminent threat to the broadcast industry as a whole; indeed, it found a substantial interest in ensuring "the widest possible dissemination of information" from diverse sources. *Id.* at 2470. It also emphasized that the interest in eliminating restraints on fair competition "is always substantial," even when (indeed, perhaps especially when) the regulated subject matter is the media, since anticompetitive action by some might drown out the speech of others. *Ibid.*; *see Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

Appellants suggest (see NCTA Br. 40) that Congress's interest in protecting broadcast television extends, at most, to preserving a minimum number of broadcast outlets in each community. That highly constricted view is not consistent with the understanding of the Nation's long-standing policy of promoting diversity in communications held by this Court, Congress, and the FCC. "[A]ssuring that the public has access to a *multiplicity* of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amend-

ment." *Turner*, 114 S. Ct. at 2470 (emphasis added). Given the central role of free broadcast television in informing and entertaining the public (see United *States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)), there is surely a substantial interest in fostering a multiplicity of sources *within* that "unique medium." See *Red Lion*, 395 U.S. at 390, 392. Congress has long directed the FCC to maximize the number of broadcast stations available to a community. See 47 U.S.C. 303(g) (charging FCC with encouraging "the larger and more effective use of radio in the public interest"). The FCC in turn has identified one of its "basic goals" as fostering "service to as many persons from as many diversified sources as possible." *In re Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C.2d 1345, 1349 (1980); see *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 654, 667-668 (1972) (plurality opinion).

Because of the important First Amendment values promoted by a diverse system of free broadcast television, Congress may act to protect that system from even partial and gradual erosion ("incremental weakening") by anti-competitive conduct at the hands of cable operators. The "paramount" interest of the viewers in retaining access to a multiplicity of sources would be impaired by such erosion. That would be so even if viewers in each community might be left with a few broadcast stations that were strong enough to resist cable operators' anti-competitive conduct.[4]

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[4] Appellants suggest that Congress's concern for broadcast television amounts to content-based discrimination. That contention merely reargues the proposition centrally rejected in *Turner*, namely, that must-carry requires strict scrutiny. See 114 S. Ct. at 2460-2461, 2466-2467. While it is true that must-carry distinguishes between broadcasters and cable programmers, that distinction is unrelated to content. *Id.* at 2460. And the Court has already concluded that Congress may show special solicitude for free broadcast television, "a medium that has become a vital part of the Nation's communication system." *Id.* at 2461. The continued vitality of free broadcast television "is not only a permissible governmental justification, but an important and substantial federal interest." *Ibid.* (citations omitted); see also *id.* at 2469-2470.

Appellants' attack on must-carry as underinclusive (because non-vertically integrated cable programmers are not also granted rights of mandatory carriage) also fails. "[T]he First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 387 (1992). Given the significance to the Nation of free broadcast television, Congress may act in a particular way to rectify discriminatory carriage actions against broadcasters, while addressing by other regulatory means (or leaving to the market) problems faced by cable programmers in gaining access to cable systems (*i.e.*, problems that do not threaten to deprive the public of a medium of communication). See *Turner*, 114 S. Ct. at 2468; cf. *Leathers* v. *Medlock*, 499 U.S. 439, 452 (1991).

The government's "always substantial" (114 S. Ct. at 2470) interest in eliminating restraints on fair competition is also sufficient to protect the financially vulnerable broadcast stations that are most likely to be the victims of cable operators' anti-competitive actions. "Congress did not have to find that all broadcasters were at risk before acting to protect vulnerable ones, for the interest in preserving access to free television is valid throughout the Nation." *Id.* at 2474 (Stevens, J., concurring in part and concurring in the judgment). We are not aware of any authority to the effect that Congress may not protect, from anti-competitive conduct, those entities that are most likely to be its targets. Cf. *Associated Press*, 326 U.S. at 13, 17-18.

B. Cable Operators Have Incentives To Discriminate Against Financially Vulnerable Broadcast Stations In Their Carriage Decisions, And They Have So Discriminated In The Past

In *Turner*, the Court instructed the district court to take evidence on "two essential propositions: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be

refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." 114 S. Ct. at 2471. The remand emphasized, however, that those propositions are fundamentally legislative and predictive in nature, and that "courts must accord substantial deference to the predictive judgments of Congress." *Ibid.* While the courts exercise independent judgment in determining that First Amendment rights are not violated, that task "is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with [the courts' own]. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Ibid.*

Substantial evidence submitted to Congress and compiled on remand demonstrates that cable operators have incentives to discriminate against significant numbers of their broadcast competitors—to maximize the audience and advertising revenues of their affiliated cable programmers, and to obtain advertising revenues that would otherwise be lost to them and might go to local broadcasters. See 1992 Cable Act §§ 2(a)(5) and (14). The evidence further shows that, without must-carry, cable operators did in fact drop those competitors from carriage.

1. The cable industry is horizontally concentrated and vertically integrated. Multiple cable system operators (MSOs) own large numbers of cable systems nationwide; those operators are also affiliated with originators of cable programming. See 1992 Cable Act §§ 2(a)(4) and (5); Senate Report 24-29, 32-34; H.R. Rep. No. 682, 101st Cong., 2d Sess. 36-39 (1990). That vertical integration gives cable operators the incentive and means to discriminate in favor of their affiliated programmers against local broadcasters.

Vertical integration gives cable operators the incentive to increase the local audience exposure, and therefore the nationwide advertising revenues, of their affiliated cable programming networks. Noll Dec. ¶ 23 (J.A. 1013-1014).

Because programming costs of vertically integrated MSOs are incurred internally, those operators seek to maximize audiences nationally, even if local consumers prefer a broadcast alternative. Dertouzos Dec. ¶ 6a (J.A. 959). Vertically integrated systems seek to enhance the value of their integrated cable networks by discriminating against the carriage of competitive program services that are close substitutes. Noll Dec. ¶¶ 18-22 (J.A. 1009-1013). Because of the nature of their programming, independent commercial stations are especially likely to be subject to adverse carriage actions absent must-carry protection:

> Independents, with their mixture of off-network and first-run syndicated programs, movies and sports, are the closest substitute for many of the cable program services that cable operators want to promote. The cable operator thus has a financial incentive to harm local independents even though subscribers prefer the disadvantaged broadcast service to the cable services which the system favors.[5]

As one cable operator explained regarding its decision to drop a local broadcaster: "Why have people trained to watch UHF?" 1992 House Report 52.

Congress could reasonably predict that the potential for abuse in the vertical integration of the cable industry would increase. While before 1984 cable operators had equity interests in 38% of cable programming networks, 64% of cable programming channels launched in the late 1980s were vertically owned. By 1994, MSOs serving more

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[5] Comments of Chris-Craft Industries, Inc., *In re Carriage of Television Broadcast Signals by Cable Television Systems*, MM Dkt. No. 90-4, CR Vol. I.Q, Exh. 74, at 7 (Sept. 25, 1991) (emphasis omitted) *(Chris-Craft Comments)*; see also *Competitive Problems in the Cable Television Industry: Hearing Before the Subcomm. on Antitrust, Monopolies and Business Rights of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 323 (1989) *(Competitive Problems in the Cable Television Industry)*.

than 70% of the nation's cable subscribers held equity interests in cable programming.[6] The percentage will increase as the cable industry becomes more horizontally concentrated.[7] "As MSOs that hold interests in cable programming continue to acquire non-integrated systems, the national market share of vertically integrated systems will * * * grow." Noll Reply Dec. ¶ 8 (J.A. 2005).

Appellants argue that must-carry cannot be justified as a response to dangers of vertical integration because it applies to non-vertically integrated systems also, and because Congress addressed vertical integration in separate sections of the 1992 Cable Act. As just noted, however, cable systems serving 70% of the nation's cable subscribers are vertically integrated. See pp. 19-20, *supra*. Thus, Congress was addressing a problem that is and will be present in the clear majority of cases.

Furthermore, the relevant problem is not vertical integration *per se*, but the potential for abuse by vertically integrated cable operators against their direct competitors. Vertical integration, if unaccompanied by discriminatory self-preference, can create significant efficiencies in the cable market. See 1992 House Report 43. Congress

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[6] See Defendants' Joint Statement of Evidence Before Congress (JSCR) ¶ 197 (J.A. 1332), *In re Implementation of Section 19 of the Cable Television Protection and Competition Act of 1992, First Report*, 9 FCC Rcd 7442, 7526 (¶ 167) & nn. 455, 457 (1994) (identifying vertically integrated MSOs); Defendants' Additional Evidence (DAE) Vol. VII.K, Exh. 266, at 2 (Turner document showing dominance of vertically integrated MSOs).

[7] In March 1994, four MSOs controlled 47% of all cable systems, and ten MSOs controlled 63% of all cable systems. See *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Notice of Inquiry*, 10 FCC Rcd 7805, 7819-7820 (1995). The FCC reported that additional mergers took place in 1994 that "significantly alter[ed] the market shares of those [top] ten companies," and that other "mergers [had] been announced that will result in further national concentration." *Id.* at 7820.

therefore permitted some vertical integration in the cable industry, and required only "reasonable limits" on the number of channels on a cable system that can be occupied by vertically integrated programmers. See 47 U.S.C. 533(f)(1)(B); 47 C.F.R. 76.504.

Cable operators still have an incentive, however, to discriminate against unaffiliated local broadcasters even on the part of the cable system that may not be used for affiliated programming. Because local broadcasters are in direct competition with cable operators' affiliated programmers for audience and advertising, cable operators may drop directly competing local broadcasters for other programmers (even unaffiliated cable programmers) less likely to compete with their own programming for audience and advertising. See Noll Dec. ¶¶ 21-25 (J.A. 1011-1016).

2. Substantial evidence also confirms Congress judgment that cable operators and broadcasters compete for advertising revenues, and therefore all cable operators—whether or not affiliated with cable programmers—have incentives to discriminate against broadcast television programming. 1992 Cable Act § 2(a)(14). Cable operators have an incentive to carry cable networks on which they can sell advertising themselves, rather than broadcasters who sell their own advertising. See Noll Dec. ¶ 23 (J.A. 1013-1014).

The importance of advertising to cable operators was becoming apparent at the time of the enactment of the 1992 Cable Act, and Congress recognized that it was growing. Congress knew that cable operators' ability to compete against broadcasters in the local advertising market was increasing because of new technology, cooperative marketing agreements among cable operators, and clustering of cable systems.[8] In fact, systems serving more than 80% of

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[8] See *Competitive Problems in the Cable Television Industry* 321; *Cable TV Consumer Protection Act of 1989: Hearings on S. 1880 Before the Subcomm. on Communications of the Senate Comm. on Commerce*,

subscribers are now able to run local advertising. Dertouzos Dec. ¶¶ 16-17, 23 (J.A. 964-965, 967-968). Whereas basic cable subscriber revenues fell from 1993 to 1994, local advertising revenues accounted for approximately 50% of cable's overall revenue growth in the same period. Basic cable subscriber revenues are expected to have only a modest 4.9% annual growth rate through the year 2000 (barely exceeding inflation), but local advertising revenues, when measured in constant dollars, are expected to account for 40% of cable's growth through the year 2000. *Id.* ¶¶ 10b-11 (J.A. 961-962).[9]

The record on remand explains why advertising revenue is becoming more important to cable operators in the

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Science, and Transportation, 101st Cong., 2d Sess. 170-171 (1990) *(Cable TV Consumer Protection Act of 1989)*. In the past, advertising on local cable systems was hampered by several factors, including the fact that it was cumbersome to place advertisements on all the cable systems within a large geographic area that advertisers were interested in reaching. Dertouzos Dec. ¶ 13 (J.A. 963). Those limitations are being overcome. New technologies permit the simultaneous insertion of local advertising on multiple cable systems in a large area. *Id.* ¶ 15 (J.A. 963). Cable operators have also engaged in cooperative marketing strategies (interconnects), under which they sell advertising in concert on the cable channels that they carry. *Id.* ¶ 16 (J.A. 964). In addition, cable operators have begun to "cluster" (purchase and combine) cable systems in a large market. *Id.* ¶ 19 (J.A. 965); Noll Dec. ¶ 24 (J.A. 1014-1015). Because of interconnects, clustering, and the reduction in cost of required technologies, even small cable systems are developing advertising capabilities and will likely have rapid growth in advertising. Dertouzos Dec. ¶ 24a (J.A. 968). All these factors now give cable operators greater incentive and ability to drop local stations from the system for the purpose of substituting advertising sold by the cable system for ads sold by the local station.

[9] Industry analysts concluded that, between 1992 and 1994, cable operators' local advertising revenues increased almost 50%, to more than $1.2 billion. See DAE Vol. VII.K, Exh. 242, at 1 (J.A. 309). The analysts estimate that those revenues will increase to $2.9 billion by the year 2000, and to $4.4 billion by 2004. *Ibid.*

future. First, because cable subscriber penetration is expected to level off at 70%, cable operators must look to revenue streams other than subscriber fees. Dertouzos Dec. ¶ 10a (J.A. 961). Second, because advertising does not require recurring expenses after the initial investment in the requisite technology and the development of a competent sales force, its economic significance "is further magnified because profit margins are especially high on these incremental revenues." *Id.* ¶ 12 (J.A. 962).[10] The remand record thus strongly corroborates Congress's judgment, made after an extensive investigation of the cable industry, that advertising revenues were an important motivation for cable carriage decisions and were becoming even more important."[11]

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[10] Appellants' internal documents confirm the growing importance of advertising revenues to cable operators. *E.g.*, DAE Vol. VII.K, Exh. 249, at 2407 (J.A. 1248) (Time Warner document analyzing the importance of advertising revenues); DAE Vol. VII.K, Exh. 239 (J.A. 134-156) (Time Warner document explaining importance and potential of advertising); DAE Vol. VII.J, Exh. 217, at 48 (J.A. 1762) (A&E document analyzing importance of advertising); DAE Vol. VII.K, Exh. 228 (J.A. 2119-2126) (TCI document; similar). Independent analysts confirm the importance of advertising revenues to the cable industry. *E.g.*, DAE Vol. VII.K, Exh. 231, at 15; DAE Vol. VII.K, Exh. 232, at 13,781-13,784 (J.A. 227-232); DAE Vol. VII.K, Exh. 246, at 23,980 (J.A. 250-253).

[11] Indeed, even before the 1992 Cable Act was enacted, Congress received substantial evidence that cable operators had dropped broadcasters in order to maximize their own advertising revenues. See JSCR ¶¶ 167-185. Congress heard, for example, that the largest MSO, Tele-Communications, Inc. (TCI), required its cable systems to carry its vertically integrated home shopping network in lieu of broadcast home shopping stations, despite local preferences for the latter. *Cable TV Consumer Protection Act of 1991: Hearing on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong., 1st Sess. 13-19 (1991). Even if TCI's shopping channel attracted fewer viewers, TCI would still profit by obtaining commissions from shopping sales of its cable subscribers,

Moreover, the remand record establishes that, with the exception of a few highly popular cable networks and broadcast stations (such as the network affiliates), a cable operator's choice between carrying a cable network or a broadcast station has little or no effect on cable subscriptions, *and that subscribership does not inform that carriage decision.*[12] Rather, the critical factor is the advertising revenue that can be obtained by carrying cable programmers instead of broadcasters. The opportunity to sell such advertising gives cable programmers an additional value to operators above broadcast stations with comparable or even higher ratings, and thus gives cable operators the incentive to discriminate against broadcasters with whom they compete for advertising revenues.[13]

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which could not be realized from carriage of broadcast shopping stations. See Noll Rebuttal Dec. ¶ 19 (J.A. 1797-1798).

[12] Noll Dec. ¶¶ 14-29 (J.A. 1005-1019); Noll Rebuttal Dec. ¶¶ 19-23 (J.A. 1797-1800); Noll Reply Dec. ¶¶ 3-4 (J.A. 2003). Judge Williams also accepted that, "for both marginal cable and broadcast stations, operators' decisions on what to air will not often rest on either's meager ratings." J.S. App. 71a. Time Warner suggests that it cannot be motivated by advertising revenue, because it pays more in total carriage fees to programmers than it receives in total advertising revenues. Carriage fees (which reflect ratings) might be a factor with respect to carrying the most popular cable networks, but they are irrelevant to a cable operator's carriage decision between a less-watched cable network and an independent UHF commercial station. With respect to that decision, the advertising revenue that could be obtained from preferring the cable programmer is more significant than ratings or any effect on subscribership. Dertouzos Reply Dec. ¶ 18 (J.A. 2019).

[13] See Noll Dec. ¶ 19 (J.A. 1010). Cable programming networks allot, on average, two minutes per hour of programming for advertising ("ad avails") for sale by local cable operators. *Id.* ¶ 23 (J.A. 1013). A statistical analysis demonstrated that the carriage of additional broadcast stations on a cable system has a significant negative impact on the cable operator's advertising sales volume. Thus, "[d]ue to these competitive effects and their increasing importance,

Appellants argue that, "[i]f cable operators truly had an overriding incentive to win advertising dollars by dropping broadcasters, then they would drop stations with significant viewership (*i.e.*, the network affiliates)." Time Warner Br. 24; see also NCTA Br. 28. The evidence on remand established, however, that cable operators compete directly with small independent stations, *not* network affiliates, for advertising dollars.[14] Advertisers on dropped independent broadcast stations would be more likely to migrate to cable systems than to more expensive network affiliates. Even if a cable operator could not capture all the advertising of a dropped station, it would gain at least

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cable operators will have few incentives to carry the signal of competitors that will become stronger as a result of [cable carriage]." Dertouzos Dec. ¶ 29 (J.A. 971); see *id.* ¶¶ 24-25, 28 (J.A. 968-971); Dertouzos Reply Dec. ¶¶ 8-16 (J.A. 2015-2018).

Appellant NCTA suggests that Congress could allow cable operators to sell advertising on broadcast stations that they carry. That approach would reduce the total amount of programming and advertising time under the control of the broadcaster. It would therefore either cause a loss in advertising revenues for the broadcaster, or would require the broadcaster to reduce its programming—exactly the dangers to which must-carry is addressed.

[14] See Dertouzos Reply Dec. ¶ 26 (J.A. 2023); Second Meek Dec. ¶¶ 31-34 (J.A. 1865-1867). Must-carry does not depend on the proposition that cable operators would necessarily attack their *strongest* competitors (the broadcast network affiliates), as appellants appear to suggest. A cable operator that considered dropping the most popular broadcast station for the purpose of obtaining that station's advertising revenues would obviously have to balance that consideration against the possibility of a decrease in subscribership if it dropped one of its most popular offerings, which was also available over the air. But, as for the more vulnerable broadcasters with little bargaining leverage against cable operators, the evidence on remand clearly established that cable systems could and would make carriage decisions principally with regard to advertising revenues, and without regard to the size of those broadcasters' audiences (or the audiences of the cable networks that would replace them). See p. 24, *supra*.

some advertising revenue by carrying a cable network instead. That would allow the operator to run its own advertising; carrying a broadcast station does not. Noll Dec. ¶19 (J.A. 1010).[15]

3. Cable operators thus have incentives to discriminate against directly competing broadcasters, and substantial evidence established that those operators, in the absence of must-carry, *did in fact* take action against significant numbers of broadcast station competitors in their carriage decisions. A carriage survey conducted by the FCC in 1988 reported that cable operators had dropped broadcast stations in thousands of instances. While Congress judged those findings significant on their face, it also took into account the probability that the FCC's survey underreported the extent of the problem. See Senate Report 43; 1992 House Report 52 n.52.[16] The legislative record also

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[15] Those economic incentives apply as well to carriage decisions involving public stations, even though they do not compete directly for advertising dollars. A cable operator has an economic incentive to deny carriage to a public broadcast station in order to place advertising on the "ad avails" assigned to it by a cable program network.

Appellants point to a 1991 Federal Trade Commission (FTC) staff study that examined the FCC's 1988 carriage survey and concluded that cable operators had not dropped broadcasters to acquire market power in advertising markets. NCTA Br. 28. When the data for that study were compiled, however, cable operators' reliance on advertising was not nearly so advanced as it is now. Moreover, a cable operator need not seek "market power" in the advertising market to be motivated to drop a broadcaster; it need only seek the advantage of selling its own advertising, which it cannot do if it carries a broadcaster. Finally, although the FTC staff concluded that cable operators had dropped mostly low-rated broadcasters, they did not consider the fact that those broadcasters had ratings equal to or greater than many cable networks (the majority of which have no measurable ratings at all). Third Meek Dec. ¶ 20 & Chart 1 (J.A. 2061).

[16] The FCC's survey examined carriage decisions during the period in which its must-carry rules were not in effect, principally from July 19, 1985, to August 7, 1986. Some examination was also made of the

includes extensive testimony and submissions about adverse carriage decisions from cable operators, broadcasters, and state and local governments from which Congress could reasonably conclude that, prior to 1992, many broadcast stations had been denied carriage or were adversely repositioned by cable systems. See Defendants' Joint Statement of Evidence Before Congress (JSCR) ¶¶ 291-467; Pub. Br. Supp. St. ¶¶ 69-116.

The evidence on remand confirmed Congress's judgment. Appellants' own data show that, before must-carry

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period after the D.C. Circuit struck down a second set of must-carry rules on December 11, 1987. The FCC reported that (1) of the 912 broadcast stations that responded to the survey, 280 (30%) had been dropped or denied carriage, in a total of 1533 instances; (2) 80 of the 237 public stations (33%) that responded to the survey had been dropped or denied carriage on at least one cable system; (3) 83 of the 186 commercial independent stations (44.5%) had been dropped at least once; (4) 860 of the 4,303 cable systems that responded to the survey (20%) had dropped or denied carriage to one or more broadcast stations in 1,820 instances; and (6) 974 cable systems had repositioned broadcast stations, in 2,495 instances. See CR Vol. I.P., Exh. 52, Tables 1, 2, 8, and 10 (J.A. 47, 48, 54, 57). But that evidence likely understates the problem, for as the district court noted, the data reflect adverse carriage actions taken at a time when cable operators were exercising restraint to avoid enactment of mandatory carriage rules. See J.S. App. 13a.

Appellees' expert determined, from carriage information for 1985-1992 derived from copyright carriage data filed by cable systems with the Copyright and Licensing Division of the Library of Congress, that (1) the FCC survey substantially underestimated the actual number of drops (Meek Dec. ¶ 11, J.A. 621); (2) most reported drops lasted for more than one year (*id.* ¶ 36, J.A. 626); and (3) the cumulative and net impact (*i.e.*, the number of stations that were dropped and *remained* dropped) continued to grow "steadily worse until Congress enacted must carry requirements in 1992" (Third Meek Dec. ¶ 6, J.A. 2055). He concluded that, by June 1992, a total of 1,261 broadcast stations had been dropped for at least one year, in a total of 7,945 drops. Meek Dec. ¶¶ 1-15 (J.A. 617-622).

was enacted in 1992, the "typical cable system" denied carriage to 28-31% of broadcast stations. Besen Dec. Attach. C, Exhs. C-2 and C-3 (J.A. 907-908). Cable operators denied access principally to their chief competitors for viewers and advertising dollars, the independent commercial stations and secondary public broadcasters. While cable systems predictably carried the network affiliates, the typical cable subscriber was denied access to 39-40% of UHF independent commercial stations and 22% of local public stations (including 30-31% of UHF public stations). *Id.* Exhs. C-4 and C-5 (J.A. 909-910).

Those adverse carriage actions seriously impaired the ability of stations that were denied access to reach their audiences. Independent commercial stations, on average, were denied access to 47% of their potential cable audience, and public stations were denied access to 36% of their potential cable viewers. Rohlfs Rebuttal Dec. ¶ 3a (J.A. 1870). The effect of discrimination against new entrants was even more substantial. Independent broadcast stations that signed on air after mid-1985 were denied carriage by cable systems serving 52% of the cable audience in their areas of dominant influence (ADI). Third Meek Dec. ¶ 4 (J.A. 2054). New educational stations were not carried on systems serving 71% of the cable households in their ADI markets within 50 miles of the city of license. *Ibid.*

Cable operators dropped broadcast stations in markets of all sizes, including those with few broadcast outlets. Even in communities served by only four broadcast stations, almost half the local cable systems carried fewer than all four stations. The average number of stations carried in markets receiving eight broadcast signals was little more than six. In markets served by 11 stations, the average number actually carried was about eight. For markets receiving more than 11 signals, cable operators did not, on average, increase the number of signals carried. Dertouzos Reply Dec. ¶ 11 (J.A. 2016). Thus, regardless of

the size of the market, cable operators denied at least one quarter of the local broadcast stations the opportunity to reach the cable audience—creating a risk that all viewers in those markets would lose the benefit of a significant percentage of the broadcasting in their communities.[17]

Appellants argue that must-carry is unnecessary because cable systems voluntarily carried those broadcast stations accounting for the large majority of television viewing in non-cable homes. But that point, even if true,[18] merely confirms what has never been disputed: in *both* broadcasting and cable programming, a relatively few stations account for the large majority of viewership share.[19] It is not surprising that cable operators have

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[17] Judge Williams relied (J.S. App. 72a) on an FTC study that concluded, based on the 1988 FCC carriage survey, that "when three local signals were available, *all* were carried; when nine local stations were available, about six were carried." From this, he concluded that "those areas with the fewest broadcast stations have the greatest proportion of voluntary carriage and the least need for forced carriage." *Ibid.* (emphasis omitted). But as explained in the text, the data contradict his conclusion. While a greater number of stations might have been denied carriage in the larger markets, the proportional impact of discriminatory carriage practices was similar across all markets.

[18] Appellants make much of Dr. Besen's conclusion that cable operators voluntarily carried almost all broadcasters with "any measurable viewership." Dr. Besen examined the carriage of broadcast stations shortly before the 1992 Act's must-carry rules went into effect, and measured those stations' viewership by ratings in November 1994. His conclusions are flawed because of, *inter alia*, a failure to control adequately for the possibility that stations with low viewership had low viewership precisely because they had not been carried in the past. See Second Meek Dec. ¶¶ 4-7 (J.A. 1855-1857). The must-carry rules for commercial broadcast stations did not take effect until June 1993, and Dr. Besen's use of November 1994 ratings reflects not even a year and a half of carriage history.

[19] "[A]bout 90 percent, maybe even more, of the share attributed to all cable networks as a group is attributed to about 10 [out of approximately 160] of the rated networks." McLaughlin Dep. 252 (J.A. 441).

voluntarily carried the most popular broadcast stations; the 1992 Cable Act is structured on the assumption that they would do so. The fact remains, however, that cable operators, in choosing between other broadcasters and the less-watched cable programmers, have a strong incentive to discriminate in favor of the latter. That incentive does *not* depend on subscribership reaction or audience share.[20]

C. Discriminatory Carriage Actions Adversely Affect The Programming Quality And Financial Health Of Broadcast Stations

Congress enacted the 1992 Cable Act because of concern that discriminatory carriage decisions would lead to "reduced viewership, lost advertising revenues, and resulting forced reductions in local news, public affairs, and other public interest programs, the inability of new stations to obtain financing to comme[n]ce operations, and bankruptcy for existing stations." 1992 House Report 51-52. Those likely effects—confirmed by substantial evidence before Congress and on remand—directly implicate viewers' First Amendment interest in a "multiplicity" of information sources. If the programming quality and financial health of broadcasters decline, viewers will have fewer options in the significant medium of free local broadcasting. That will be true whether the viewer lacks cable service (and is therefore especially dependent on free television as an information source) or has cable service (but sometimes watches broadcasts on sets not connected

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Thus, 94% or more of cable program networks are as little watched as the must-carry broadcast stations that appellants take such pains to deride. Indeed, using Dr. Besen's definition of reportable ratings, appellees' expert concluded that at least 48% of the cable networks in the studied markets had no reportable ratings at all. Meek Third Dec. Chart 1 (J.A. 2062).

[20] See p. 24, *supra*; Second Meek Dec. ¶ 28 (J.A. 1864-1865); Noll Dec. ¶¶ 14-29 (J.A. 1005-1019); Noll Rebuttal Dec. ¶¶ 19-23 (J.A. 1797-1800); Noll Reply Dec. ¶¶ 3-4 (J.A. 2003).

to the cable). See *Turner*, 114 S. Ct. at 2462 (noting that must-carry is intended to ensure that "all Americans," but especially those without cable service, have access to free television programming).

A wealth of evidence presented to Congress before passage of the 1992 Cable Act demonstrated as follows: Local broadcast stations that suffered adverse carriage actions were in a vulnerable position and were highly dependent on cable carriage (JSCR ¶¶ 556-588); the long-term viability of a broadcast station depends on its ability to obtain cable carriage (JSCR ¶¶ 624-642); cable carriage is critical to broadcasters' ability to obtain financing and, by 1992, cable carriage problems had made it difficult for many broadcasters to secure financing (JSCR ¶¶ 581, 302-304, 643-658); difficulties in securing carriage had contributed significantly to the bankruptcy of 23 independent stations (JSCR ¶¶ 659-683); even if a broadcast station did not go bankrupt or "dark," its inability to gain cable carriage impaired its ability to originate programming (JSCR ¶¶ 691, 693-697, 699, 701-702, 704-705, 710); denial of cable carriage caused stations to abandon programming plans, and opt for low-cost home shopping formats as the only solution to obtain financing and remain on air (JSCR ¶¶ 672, 692, 706-708); and adverse carriage actions caused public stations to lose viewer contributions (Pub. Br. Supp. St. ¶¶ 135-142).

Evidence on remand confirmed those effects. A statistical analysis of viewership and ratings demonstrated that, "when a broadcast station is dropped from a cable system, viewership in households served by the system" declines "to approximately zero." Rohlfs Dec. ¶ 6 (J.A. 1158). Because loss of access to viewers depresses advertising revenues (and in the case of public stations, viewer contributions), and therefore diminishes funds available to broadcast stations for original or other costly programming, adverse carriage actions cause a decline in average program quality and number of hours of programs

offered. The assurance of cable carriage is also essential to investment in new broadcast stations, and broadcasters without such assurance have difficulty in obtaining even start-up capital.[21]

By contrast, stations that obtained cable carriage after enactment of the 1992 Cable Act gained significant numbers of television viewers as a result. Meek Dec. ¶¶ 98-99 J.A. 631-632). Thus, although appellants argue that must-carry benefits only little-watched stations, even less popular broadcast stations are indeed valued by the public and can prove their value if given fair access to the entire cable audience. But without access to that audience, independent broadcasters would have little chance of making themselves available to the majority of the potential audience, or securing the advertising or viewer contributions necessary to strong financial health and programming.[22]

It is true that the number of broadcasting outlets grew overall during the 1980s. That growth, however, occurred principally when the FCC's must-carry rules were in place, and was made possible largely by the carriage of broadcast stations on cable systems, which allowed "the expansion in the number of broadcast television stations

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[21] See Noll Dec. ¶¶ 36-42 (J.A. 1024-1029); Dertouzos Dec. ¶ 30 (J.A. 971-972); Schutz Dec. ¶¶ 3-22, 43 (J.A. 640-648, 654); Haring Dec. ¶¶ 21-26 (J.A. 1099-1102); Second Meek Dec. ¶ 11 (J.A. 1858); Lau Dec. ¶¶ 5-9 (J.A. 2137-2138).

[22] Time Warner argues (Br. 38) that stations gaining access to cable systems through must-carry do not experience any "statistically significant" increase in viewership. That contention was based on an unscientific sample of 24 must-carry stations added to Time Warner's own cable systems. Appropriate statistical analysis demonstrates that the ratings gains of those stations were indeed statistically significant. Rohlfs Rebuttal Dec. ¶¶ 21-22 (J.A. 1876); see Schutz Rebuttal Dec. ¶¶ 18, 25-28 (J.A. 1885, 1887-1888).

by increasing the potential audiences of UHF stations."[23] After the FCC's must-carry rules were invalidated in 1987, the rate in growth of broadcast stations, including UHF independent stations, quickly fell by half.[24] The lack of mandatory carriage requirements contributed to the sharp decline in growth.[25] And between June 30, 1989, and December 31, 1991, the number of vacant UHF broadcast channels increased, from 157 to 198, principally because potential new entrants abandoned broadcast license appli-

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[23] FCC Office of Plans and Policy, *Broadcast Television in a Multichannel Marketplace* 17 (1991) (J.A. 115). See also Noll Dec. ¶ 40 (J.A. 1027-1028); Dertouzos Dec. ¶ 31 (J.A. 972). Appellants highlight the emergence of the Fox broadcast network as evidence of broadcasting's health, but the former Chairman of Fox and current CEO of United Paramount Network explained that the assurance of cable carriage (including must-carry) is essential to the start-up of a new broadcast network. Salhany Dec. ¶¶ 8-15 (J.A. 635-637).

[24] See *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). Appellants' data showed that, from 1981 through 1987, the number of broadcast stations grew from 1,038 to 1,362, an average of 46 stations per year. Besen Dec. Exh. 5 (J.A. 851-853). From 1988 to 1994, the number of broadcast stations grew from 1,362 to 1,532, an average of 24 stations per year. *Ibid.* From 1981 through 1987, the number of UHF stations grew by 42 stations per year, from 408 to 701, but from 1988 to 1992, the number grew by only 20 stations per year, from 701 to 844. *Ibid.* Whereas there was a net growth of 47 commercial stations in 1986, only 7 new commercial stations were able to sign on in 1993. Meek Dec. ¶¶ 76-78 (J.A. 627-628).

[25] Because "cable carriage has a significant impact upon an individual station's business operations and its profitability[,] * * * [t]he financial community is extremely reluctant to invest in broadcast stations where cable carriage cannot be assured." Schutz Dec. ¶¶ 15-16, 18 (J.A. 644-646); see also *Competitive Problems in the Cable Television Industry* 333.

cations or construction permits previously issued by the FCC.[26]

Congress therefore had a substantial basis for concluding that the demise of must-carry had had a chilling effect on the broadcasters' ability to reach audiences, to create programming, and to go and stay on the air. In particular, Congress could reasonably conclude that a five-year downward trend in the growth of broadcast television was significant enough that broadcasters needed protection from anti-competitive conduct by cable operators.[27] And even if the absolute number of broadcasters increased modestly after the demise of the FCC's must-carry rules, it would still have been reasonable for Congress to conclude that the decline in growth was the result of anti-competitive action by cable operators. Combatting that predatory conduct, of course, was and is a substantial governmental interest, even if broadcasting was not, as a result of it, "in its death throes." *Turner*, 114 S. Ct. at 2474 (Stevens, J., concurring in part and concurring in the judgment).

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The central purpose of must-carry is to ensure the "fair, efficient, and equitable distribution of broadcast

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[26] Judge Williams attributed the increased number of vacant channels to "FCC fiat," namely, the FCC's "own decisions to increase the number of theoretically available channels." J.S. App. 63a. His reading of the evidence is incorrect. The FCC allotted nine new broadcast channels during this time period, but the number of vacant channels increased principally because of the abandonment by potential new entrants of 14 license applications and 59 construction permits. See Federal Defendants' Statement in Response to the Court's Order of September 7, 1995, at 2-4 (Sept. 18, 1995) (J.A. 2081-2083).

[27] Judge Williams suggested that the "profit picture" of UHF independent stations improved from 1987 to 1991. J.S. App. 59a-60a. In fact, in 1991 the median UHF station was operating at a substantial loss (*id.* at 60a), and could ill afford to be denied access to cable.

services" available to the entire viewing public, as required by the Communications Act of 1934 (47 U.S.C. 307(b)). See 1992 Cable Act § 2(a)(9). Given the importance of free broadcast television to "all Americans" (see pp. 30-31, *supra*), and the fundamental First Amendment values promoted by diversity in communications, Congress has a substantial interest in maintaining the vitality of the broadcasting medium and preventing its erosion by anti-competitive conduct. A contrary rule simply cannot be squared with the "basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Turner*, 114 S. Ct. at 2470.

II. THE MUST-CARRY RULE IS NARROWLY TAILORED

For a content-neutral regulation to satisfy the requirement of narrow tailoring, it "need not be the least speech-restrictive means of advancing the Government's interests"; the standard is met "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," without "burden[ing] substantially more speech than is necessary to further" that interest. *Turner*, 114 S. Ct. at 2469. The record on remand estabished two crucial points with respect to the question of narrow tailoring.

First, must-carry's actual effect on the cable industry is negligible. The rule has had a minimal impact on cable operators' editorial discretion and cable programmers' ability to gain access to cable systems. That minimal effect must be contrasted with the severe impact on broadcasters caused by *denial* of carriage on a cable system (reducing their cable audience to zero), and with the resulting significant impairment of viewers' choices in the broadcast medium.

Second, no effective alternative to must-carry has been identified. The principal proposals mooted by appellants and Judge Williams—the antenna/switch mechanism and a leased-access regime—cannot ensure the vitality of broad-

casting that Congress believed was of fundamental importance, and cannot protect more vulnerable stations from anti-competitive conduct by cable operators. The evidence confirms that Congress reasonably concluded that must-carry is indeed necessary to prevent anti-competitive conduct, protect vulnerable broadcasters, and preserve diversity in broadcasting.

A. Must-Carry's Actual Effects On Cable Operators And Programmers Are Minimal

1. The evidence on remand established that, as a result of the 1992 Cable Act's must-carry requirements, broadcast stations gained access to less than 1.2% of the cable industry's total channel capacity of 500,000 channels. See J.S. App. 19a.[28] Ninety percent of cable systems had to add no more than one (if any) broadcast station to their lineups. *Carriage of Must-Carry TV Broadcast Stations* 11 (Table II-2) (J.A. 675); Meek Dec. ¶¶ 110-111 (J.A. 632-633). And cable operators were able to satisfy their must-carry obligations by using previously unused channel capacity almost 87% of the time.[29]

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[28] There are 11,628 cable systems nationwide, with an average capacity of 43 channels each. See *Carriage of Must-Carry TV Broadcast Stations* 1 & App. 3, at 2 (J.A. 671). Multiplying those two figures yields 500,004 channels within the industry. As a result of the 1992 Cable Act's must-carry rule, broadcast stations gained carriage on 5,880 of those 500,004 channels, or 1.18% of the total capacity. *Id.* at 11 (J.A. 675). Channels occupied by broadcast stations that were carried by a cable system before the enactment of the 1992 Cable Act but nevertheless elected must-carry status after 1992 comprise 12,235 channels carrying public stations and 17,771 (38% of 46,765) carrying local commercial stations, a total of 30,006. *Id.* at 16 (J.A. 681). Thus, the total number of channels devoted to carriage of must-carry stations is 35,886 (5,880 + 30,006), just over 7% of the industry's capacity.

[29] Cable operators had to drop programmers on only 780 channels to accommodate the addition of must-carry broadcast stations on 5,880 channels. *Carriage of Must-Carry TV Broadcast Stations* 11, 14 (J.A. 675, 678).

Must-carry also places a very small burden on programmers seeking to acquire and maintain cable carriage. Only 640 cable systems (less than 6% of all 11,628 systems nationwide) had to drop even a single cable program service to accommodate broadcast stations added because of must-carry. *Carriage of Must-Carry TV Broadcast Stations* 14 (Table II-4) (J.A. 678). The total number of drops to accommodate must-carry stations was 780 (out of 500,000 channels), of which only 530 were drops of cable programming. *Id.* at 14, 15. Thus, even among the few systems that dropped any programming services at all, the average number of cable services dropped was less than 1 (530 drops among 640 systems).[30]

Furthermore, because of past and future increases in channel capacity, must-carry's already marginal impact on cable systems and programmers has waned and will continue to do so. Between December 31, 1992, and June 1, 1995, the cable industry's channel capacity grew by about 88,000 channels. Shooshan Dec. ¶ 29 (J.A. 696). That increase since the 1992 Cable Act was passed exceeds the number of channels on which broadcast stations gained cable carriage (5,880) by a ratio of 15 to one—meaning that, notwithstanding must-carry, cable systems have more capacity today on which to carry cable networks than they had in 1992. As a result, cable systems have been able to restore carriage to many of the programming services that were dropped from cable systems when must-carry first took effect. See *id.* ¶ 16 (J.A. 692-693); Clouston Dep. 64 (J.A. 334). Total carriage of virtually all the appellants' networks has increased since 1992 by hundreds of sys-

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[30] Of the 27 cable networks involved in this litigation, 17 presented no evidence of any drops at all. Among the rest, the average number of drops was less than six nationwide. No cable network provided evidence of more than 12 drops nationwide. See Gov't Mem. in Opp. to Pls. Mot. for Summ. Judg. 68-69 (Table 2) (citing Turner appellants' declarations).

tems, enlarging their subscriber bases by millions of cable households.[31]

Improved electronics and fiber optic technology are allowing cable systems to increase capacity to 80, 100, and even 150 channels in the near future.[32] Using digital transmission, cable systems ultimately could offer more than 500 channels of programming.[33] "[G]iven the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium" (*Turner*, 114 S. Ct. at 2457), "rendering 'must-carry' a problem of the past." J.S. App. 2la-22a.

Appellants stress that the number of available cable programming networks exceeds the channel capacity of most cable systems, and that some cable systems were purportedly operating at full capacity as of December 1994. As a factual matter, appellants' claim that those cable systems were or are full dubious.[34] But even if some cable systems are full, the excess of demand over supply

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[31] See Gov't Mem. in Support of Mot. for Summ. Judg. 101-104 (Tables 2, 3); NAB/INTV's Statement of Undisputed Facts ¶¶ 111-252; and sources cited therein.

[32] Jackson Dec. ¶¶ 6-8 (J.A. 1115-1117); DAE Vol. VII.E, Exh. 91, at 145 *(State of Cable 1994)* (J.A. 273); DAE Vol. VII.G, Exh. 157 (Time Warner memorandum); DAE Vol. VII.G, Exh. 161, at 4 (A&E forecast); Shooshan Dec. Exh. T (J.A. 750-751).

[33] Jackson Dec. ¶¶ 9-14 (J.A. 1117-1123); Clouston Dep. 38 (J.A. 333); DAE Vol. VII.F, Exh. 141; DAE Vol. VII.G, Exh. 160 (Table 3); DAE Vol. VII.H, Exh. 195, at 776; DAE Vol. VII.Q., Exh. 419 (various surveys of future of digital compression).

[34] Of the systems reporting themselves to appellants as "channel-locked" in December 1994 for which data were available, nearly 40% added new cable programming within six months. Second Meek Dec. ¶ 76 & Attach. 4 (J.A. 1868). Virtually all of the systems that appellants reported as channel-locked for which data were available added new cable programming between March 1993 (just before the must-carry rules took effect) and April 1995. *Ibid*.

clearly is not the result of must-carry; since 1992, the cable industry's capacity has increased by 15 times the number of added must-carry stations. See p. 37, *supra*. If cable systems are full, it is because they have added new channels of cable programming. More than 100 cable networks are vying for space on a typical cable system of (currently) 43 channels. Turner Br. 43. Dedicating 1.2% of that capacity to added broadcast stations does not materially contribute to the competition, nor would the absence of must-carry materially relieve it.

There has also been significant growth in the number of cable networks since must-carry was enacted. From 1987 to 1992, the number of national cable program networks was essentially stable, rising from 75 to 80. After must-carry's enactment, the number grew to 109 national networks by 1994, and to 128 national (plus 40 regional) networks by 1995. All Parties' Joint Statement of Undisputed Facts ¶ 137; Turner Br. 43. That growth reflects the judgment of the market that available capacity is sufficiently plentiful to launch commercially successful new networks, notwithstanding the must-carry rules. Shooshan Dec. ¶ 55 (J.A. 705-706).[35]

2. Appellants maintain that must-carry sweeps too broadly because, even if financially vulnerable stations might be deserving of protection, some "highly profitable" stations have elected must-carry status "on at least one" cable system in each ADI. Time Warner Br. 35-36 (emphasis omitted). Since there are, on average, 53 cable

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[35] Appellant programmers argue that cable systems' failure to add ("launch") their networks is the result of must-carry. Turner Br. 47; Time Warner Br. 43. But none of the appellants has submitted evidence that any one of its networks was denied carriage on more than 25 cable systems (out of 11,628 nationwide) because of must-carry. See Gov't Mem. in Opp. to Pls. Mot. for Summ. Judg. 68-69 (Table 2) (citing Turner appellants' declarations). In fact, carriage of almost all their networks has increased since 1992 by hundreds, if not thousands, of systems. See pp. 37-38, *supra*.

systems within each broadcast station's ADI (*id.* at 19 n.22), evidence that a few profitable network affiliates have elected must-carry status "on at least one" cable system proves little. Indeed, Time Warner identified only 29 stations that supposedly fall within the category of undeserving profitable broadcasters that have ever elected must-carry, on a total of 49 cable systems. See Time Warner Exhs. 47-48; Meek Dec. Exh. U. That amounts to only 0.8% of the 5,880 added must-carry stations nationwide. And, of course, even some network affiliates might have reason to invoke must-carry's protection. See Third Meek Dec. ¶¶ 24-34 (J.A. 2063-2067).

This Court has never required that a content-neutral regulation be absolutely precise in distinguishing the situations legitimately covered by the regulation from those that arguably should be left outside its scope. "What [the] decisions require is a '"fit" between the legislature's ends and the means chosen to accomplish those ends,'—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989) (citation omitted).[36] Thus, even if a few profitable stations have indeed benefited from the must-carry rule, it is nonetheless true that, on the whole, the "fit" between the proportion of vulnerable commercial stations and the frequency with which commercial stations exercised the must-carry option is reasonable.

B. The Proffered Alternatives To Must-Carry Would Not Effectively Promote Congress's Objectives

Pursuant to the remand instructions, the district court considered "the availability and efficacy of 'constitutionally acceptable less restrictive means'" to advance the substantial interests served by must-carry. *Turner*, 114 S. Ct. at 2472. It correctly concluded that various suggested alternatives "are not in any respect as effective in achieving the government's important objectives." J.S. App. 23a.

1. *A/B Switches and Antennas*

Theoretically, cable subscribers could receive over-the-air broadcast signals on their cable-wired sets if they maintained outdoor antennas and installed input selector switches, or "A/B switches," on their televisions to change from reception of cable signals to broadcast signals. Congress correctly concluded, however, that cable subscribers would not use A/B switches on their cable-wired sets to receive broadcast signals not carried over the cable. 1992 Cable Act §§ 2(a)(17) and (18). The "antenna/switch" alternative suffers from two serious flaws: the antenna, and the switch.

Congress found, when it investigated the matter, that the great majority of households served by cable do not have roof-top antennas; indeed, zoning ordinances and restrictive covenants often prohibit installation of such antennas.[37] Even those households that would be permitted to install outdoor antennas would have to incur a substantial cost ($250 in some cases) to do so.[38] That expense would deter use of the "antenna/switch" alternative for those already paying monthly fees for cable television service, Dertouzos Dec. ¶ 29 (J.A. 971), and thus

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[36] Although *Fox* was a commercial speech case, the Court made clear that the standard for narrow tailoring of regulations of commercial speech is the same as that for content-neutral regulations of speech, as at issue here. See 492 U.S. at 478.

[37] Senate Report 45; JSCR ¶¶ 723-735; Haakinson Dec. ¶¶ 28-42 (J.A. 593-601).

[38] Stern Aff. ¶¶ 38, 48, 56 (J.A. 769, 772, 774). The cost can include installation of the outdoor antenna, which is dangerous; many consumers would hire a professional installer. See Stern Dep. 39 (J.A. 362). Indoor antennas attached to television sets are adequate for reception only when the consumer lives close to the transmitting antenna. Haakinson Dec. ¶ 36 (J.A. 597-598).

would deter the securing by this method of the benefits that Congress identified in the continued vitality of *free* broadcast television. Also, the quality of over-the-air television reception in many regions of the country is poor, because of terrain interference or man-made obstructions (the very problems cable television was created to solve).[39] Reception problems are particularly acute for UHF stations (including two-thirds of all public stations), those most at risk of discriminatory non-carriage by cable systems.[40]

The requirement of an A/B switch presents another serious obstacle to cable households' reception of broadcast signals. Although appellants present the switch as simple to install and operate, the evidence before Congress suggested that doing so would be cumbersome and confusing. Again, evidence on remand confirmed that point.[41]

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[39] 1992 House Report 70; Haakinson Dec. ¶¶ 9-38 (J.A. 582-598); Haakinson Supp. Dec. ¶ 10 (J.A. 2026).

[40] 1992 House Report 70; Haakinson Supp. Dec. ¶ 10 (J.A. 2026). Where reception of television signals is poor, broadcast stations denied cable carriage for anti-competitive reasons are worse off than they were before the advent of cable, because they are unfairly denied the opportunity to compete on an equal footing with the programmers whose signals can be received clearly over the cable. As those broadcasters fall behind in competition, the consumers without cable who are dependent on over-the-air signals (as well as the consumers with cable who would like watch those stations) become worse off too.

[41] See JSCR ¶¶ 742-770. The House Energy and Commerce Committee noted that "stand-alone A/B switches generally cannot be operated with a remote control and complicate the installation of common video equipment such as VCRs and video game equipment. On 'cable-ready' televisions, the UHF channel setting[s] are set to frequencies used by cable systems when they are connected to cable. To use an A/B switch, consumers may also have to change the UHF channel settings on their televisions, and reset them when they want to see cable channels." 1992 House Report 54. The NCTA's Committee on Engineering also advised the FCC in 1986 that A/B switches are not a workable alternative to cable because the technical difficulties

In addition, insufficient switch insolation of the cable and broadcast signals can lead to signal leakage between the two, causing interference and degradation of the television picture that are unacceptable to consumers.[42]

Congress therefore found, with good reason, that antennas and A/B switches are not an adequate alternative to must-carry because they are "unacceptable to consumers." 1992 House Report 54; Senate Report 45. When Congress reached that conclusion, it had the results of a 1991 consumer survey, to the effect that only 6% of cable subscribers had ever used an A/B switch even once, to receive broadcast television programs. J.A. 131 (CR Vol. I.Q, Exh. 71, at CR 11,020-11,021). This was the case even though five years had passed since the FCC had mandated a consumer-education program about A/B switches.[43] In short, cable subscribers will not switch between cable and antenna reception of broadcast stations on their cable-wired sets, even to watch stations that attracted a cable audience before they were dropped from carriage. Rohlfs Dec. ¶¶ 21-22 (J.A. 1163-1164).

Appellants (and Judge Williams) stress the experience in Corpus Christi, Texas, as evidence that consumers will use A/B switches. Discovery Br. 29; J.S. App. 106a. In that incident, however, all three major network affiliates were temporarily dropped from carriage at about the same time, and the drops were highly publicized locally. The incident proves little about cable subscribers' inclination

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involved in their installation and use "will be considerably more severe than a mere inconvenience." CR Vol. I.DD, Exh. 183, at CR 16,739, 16,748 (J.A. 31-32). See also Haakinson Dec. ¶¶ 45-54 (J.A. 602-609); Haakinson Supp. Dec. ¶¶ 8-9 (J.A. 2025-2026); Mem. from W. Cicora to L. Yaeger, DAE Vol. VII.M, Exh. 292, at 5 (J.A. 246).

[42] Haakinson Dec. ¶¶ 55-56 (J.A. 609-611); DAE Vol. VII.M, Exh. 292; JSCR ¶¶ 718-720, 738-741, 758-767.

[43] See *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Report and Order*, 1 FCC Rcd 864, 864 (¶ 1) (1986).

to install antennas and use A/B switches on a long-term basis to receive UHF independent stations dropped from cable. And nearly 70% of the Corpus Christi cable subscribers complained that the A/B switches were inconvenient to use, even on a short-term basis. See DAE Vol. VII.M, Exh. 291 (J.A. 2165).[44]

2. *The Century rules*

Appellants suggest that Congress could have adopted the more limited "*Century* rules" promulgated by the FCC after the D.C. Circuit struck down its first set of must-carry rules in 1985. See *Century Communications Corp.* v. *FCC*, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). The *Century* rules included a minimum viewership standard for must-carry eligibility, restricted eligible stations to cable systems within 50 miles of the broadcaster (rather than systems within the broadcaster's entire ADI), and limited the number of broadcast stations that any cable system was required to carry (no stations at all for systems with 20 channels or fewer, and a maximum of 25% of the system's channels for any cable system).[45]

It bears emphasis that the *Century* rules were never intended as a long-term regulatory solution to the problem

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[44] Appellants cite the existence on the market of "cable-ready" televisions with built-in A/B switches, Discovery Br. 25, but there is no evidence of how many such televisions have made their way into consumers' homes, see J.S. App. 104a, and the cable industry consciously declined to promote A/B switches to Congress as an alternative to must-carry because of the "hundred million TV sets" in consumers' homes that do not contain internal A/B switches. Mooney Dep. 182-184 (J.A. 330-332). Whatever the FCC and the D.C. Circuit may have thought of A/B switches in 1987, see Discovery Br. 19-24, they did not have before them the record later amassed in this case.

[45] See *Century*, 835 F.2d at 296-297. The previous set of rules was struck down in *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

of cable operators' anti-competitive actions against broadcasters. Indeed, the FCC did not even rely on the potential for such anti-competitive conduct as a basis for the *Century* rules, reflecting the fact that cable systems' vertical integration and reliance on advertising revenues were much less advanced at the time. The FCC intended those rules only as a temporary stopgap until consumers became "acclimated to the existence of [A/B] switches" (see 835 F.2d at 296), an approach that Congress later rejected as insufficient to address the serious potential for predation in the cable industry.

Given the limited purpose of the *Century* rules, the district court correctly concluded that their much more limited carriage requirements would not effectively promote the important governmental interests served by must-carry. J.S. App. 23a. Evidence showed that 86% of the broadcast stations added to cable systems under the statutory must-carry rules would be ineligible for carriage under the *Century* rules. Klein Dec. ¶¶ 21-25 (J.A. 1141-1143). In general, the *Century* rules would require carriage of only those stations that cable operators would carry voluntarily, and thus would do nothing to prevent cable operators from denying carriage to independent commercial stations (their chief competitors in programming and advertising) and many public stations.

Appellants stress the lack of a minimum viewership standard in the statutory must-carry rules as the most serious departure from the *Century* model. Yet broadcast stations other than the most popular network affiliates add materially to diversity of communications outlets and may legitimately be afforded protection from cable operators. Moreover, as we have explained (p. 24, *supra*), except for the most popular network broadcast affiliates and cable programmers, ratings do not govern either cable operators' carriage decisions or viewers' subscribership decisions, and indeed most cable programmers could not meet the viewership eligibility standard in the *Century*

rules. See Klein Dec. ¶ 22; Rohlfs Rebuttal Dec. ¶¶ 16-17 (J.A. 1141, 1874-1875). The suggested viewership standard would create a loophole for cable operators to discriminate against broadcasters in favor of cable programmers, regardless of ratings, in order to promote their own programming and to gain advertising revenues—precisely the conduct that must-carry is intended to prevent. See Senate Report 44; Noll Rebuttal Dec. ¶ 30 (J.A. 1803).

Congress also appropriately gave broadcasters must-carry eligibility on cable systems within their entire ADI (see 47 U.S.C. 534(h)(1)(A) and (C); 47 C.F.R. 73.3555(e)(2)(i) (1996)), rather than an arbitrary 50-mile limit. Broadcast stations' ratings, and by implication, their advertising revenues, are calculated based on viewership within the ADI. Noll Rebuttal Dec. ¶¶ 25-28 (J.A. 1801-1802); Schutz Rebuttal Dec. ¶¶ 39-43 (J.A. 1890-1892). And the practical difference between the statute's rule that cable operators dedicate up to 33% of channel capacity to carriage of broadcast stations and the *Century* rules' cap of 25% is minimal.[46]

3. *Leased access*

Appellants, joined by Judge Williams, suggest a "non-discriminatory" leased access regime, at regulated rates, as an alternative to must-carry. But whatever might be said in favor of leased access, it would not lessen the alleged burden on cable operators' editorial discretion. Leased access removes cable operators' editorial control over some of their channels, just as must-carry does. Indeed, expanded leased access rights for *cable* programmers, as Judge Williams contemplates (J.S. App. 97a-98a),

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[46] Only 6.66% of added must-carry stations in appellants' sample (18/270) acquired carriage because of the higher ceiling that Congress adopted. Klein Dec. ¶ 25 (J.A. 1142). Extrapolating this figure to all added broadcasters amounts to 392 of the 5,880 must-carry additions nationwide, or just 0.08% of all cable channel capacity nationwide (500,000 channels).

would create even greater interference with operators' freedom of choice. The cable operators' preference for leased access, therefore, must flow from their financial interest rather than their First Amendment interests.

A leased-access regime dominated by cable programmers would do little for viewers who do not want to pay to watch television or cannot afford to do so. If struggling independent broadcasters did not obtain access to cable viewers by means of leased access, their viewership, and ultimately the quality of their service, would decline, to the detriment of non-cable viewers. It is precisely those stations, moreover, that could least likely afford leased access to cable viewers. Requiring those stations to pay for access to cable viewers would directly contravene the purpose of must-carry, which is to preserve broadcasters' ability to devote resources to originating local programming. See 1992 Cable Act § 2(a)(16). In fact, cable operators' demands for compensation for carriage of local broadcasters was one of the specific practices that Congress sought to eliminate in the 1992 Cable Act. 47 U.S.C. 534(b)(10); see Senate Report 43, 45. Thus, reliance on leased access rather than must-carry could impair the quality of local broadcasting.

4. *Subsidies*

A system of direct governmental subsidies to local broadcasters cannot substitute for must-carry, for it would further materially different goals. Must-carry's purpose is not to guarantee the fortunes of financially vulnerable broadcasters, but to afford them the opportunity to compete fairly for a share of the viewing public over the cable. A subsidy system would guarantee the survival even of broadcasters that do not engage the attention of the viewing public (which must-carry does not) and therefore would not be a means commensurate to Congress's ends. Congress is entitled to take full action to "eliminat[e] restraints on fair competition" (*Turner*, 114 S. Ct. at 2470), not just compensate the victims.

5. *Antitrust and FCC enforcement*

The district court correctly understood that antitrust enforcement and administrative complaint proceedings are inadequate substitutes for must-carry protection. The inordinate time and expense of antitrust litigation, especially for a nascent or financially precarious station seeking cable carriage from a large vertically integrated cable operator-programmer such as Time Warner, renders such litigation a manifestly less effective alternative to the must-carry approach. An administrative complaint mechanism, requiring the FCC to examine many thousands of cable operators' business decisions to carry or not to carry individual programmers, would be highly cumbersome, and would involve long delays during which broadcast stations would continue to suffer the adverse economic consequences of discriminatory non-carriage.

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Ultimately, appellants demonstrate only that they disagree with Congress over how much carriage protection broadcast stations need, and how an acceptable level of protection is to be attained. Whether or not Congress could have struck a different balance among the various interests affected by must-carry, that disagreement with the regulatory regime carefully chosen by Congress provides no basis for second-guessing its policy judgments and reasonable factual determinations in this highly complex field. Appellants of course engage in protected speech; but that provides no cause to turn the First Amendment into a shield against economic regulation.[47]

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[47] Appellant Time Warner contends (Br. 48-50) that the district court erred in dismissing its Fifth Amendment taking claim (see J.S. App. 27a-28a). Time Warner failed to pursue its taking claim in its earlier appeal to this Court from the district court's previous grant of summary judgment to appellees. The taking claim has therefore been waived. See *Eli Lilly & Co.* v. *Home Ins. Co.*, 794 F.2d 710, 717 (D.C. Cir. 1986), cert. denied, 479 U.S. 1060 (1987); *Northwestern Indiana Tel. Co.* v. *FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990). Moreover, appellants failed to present any taking issue in their jurisdictional statement on this appeal; nor was that issue "fairly included" in their statement of the question presented, which adverted only to the First Amendment. The taking claim is therefore not properly before the Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992); Sup. Ct. R. 18.3 (incorporating, for jurisdictional statements, requirements for certiorari petitions); R. Stern, et al., *Supreme Court Practice* 397 (7th ed. 1993). Even if it were properly presented and not waived, the taking claim was properly dismissed because the requested remedy of an injunction is not available for an alleged taking of property. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984).

Time Warner also contends (Br. 47-48) that the district court erred in upholding the 1992 Cable Act's separate must-carry provisions for low-power broadcast stations. See 47 U.S.C. 534(c); J.S. App. 29a-30a. That issue, too, was not presented in the jurisdictional statement and is therefore not properly before the Court.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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